3. Contrary to petitioner's contention (Pet. 8-19), the court of appeals' decision in this case does not conflict with the decisions in *Corp* and *McCoy*.[1]

a. In *Corp*, the Sixth Circuit held that 18 U.S.C. 2252(a)(4)(B), which prohibits the intrastate possession of child pornography, was unconstitutional as applied to the "unusual facts" of the defendant's case. 236 F.3d at 332-333; see *United States* v. *Andrews*, 383 F.3d 374, 377 (6th Cir. 2004) (noting that the court of appeals in *Corp* "emphasized that [the] facts were unique"), cert. denied, 125 S. Ct. 1693 (2005). The 23-year-old defendant in *Corp* was convicted of possessing sexually explicit photographs of his 17-year-old girlfriend. 236 F.3d at 326. The court of appeals found that Corp's girlfriend "was not an 'exploited child' nor a victim in any real and practical sense." *Id.* at 332. Rather, the court stated, she "was merely months away from reaching majority," *id.* at 333, and she had "voluntarily posed for the photo-

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[1] The court of appeals' decision in this case is consistent with the great weight of appellate authority upholding the constitutionality of federal child-pornography statutes. See, *e.g.*, *United States* v. *Morales-De Jesus*, 372 F.3d 6, 10-21 (1st Cir. 2004), cert. denied, 125 S. Ct. 2929 (2005); *United States* v. *Hampton*, 260 F.3d 832, 834-835 (8th Cir. 2001), cert. denied, 535 U.S. 1058 (2002); *Harris*, 358 F.3d at 222-223; *Kallestad*, 236 F.3d at 228-231; *United States* v. *Angle*, 234 F.3d 326, 337-338 (7th Cir. 2000), cert. denied, 533 U.S. 932 (2001); *United States* v. *Rodia*, 194 F.3d 465, 474-482 (3d Cir. 1999), cert. denied, 529 U.S. 1131 (2000). Although the Eleventh Circuit issued three decisions holding provisions of the child-pornography statutes unconstitutional as applied to intrastate conduct, each of those decisions has been vacated and remanded by this Court for further consideration in light of *Raich*. See *United States* v. *Matthews*, 143 F. App'x 298 (11th Cir.) (Table), vacated and remanded, 126 S. Ct. 826 (2005); *United States* v. *Maxwell*, 386 F.3d 1042 (2004), vacated and remanded, 126 S. Ct. 321 (2005); *United States* v. *Smith*, 402 F.3d 1303, vacated and remanded, 125 S. Ct. 2938 (2005).

graphs and [did] not want Defendant prosecuted,'" *id.* at 326 (citation omitted). Those factors, the Sixth Circuit concluded, distinguished Corp's conduct from "the much more threatening situation where an adult was taking advantage of a much younger child or using the imagery for abusive or semi-commercial purposes." *Id.* at 332.

This case, by contrast, involves allegations of assaultive and coercive conduct directed against a 13-year-old girl—the type of conduct that the court in *Corp* stressed was not before it. The Sixth Circuit has declined to extend *Corp* to cases involving offenders who coerced and sexually exploited young minors. See *Andrews*, 383 F.3d at 377-378; see also *United States* v. *Gaun*, No. 04-5840, 2005 WL 3528917, at *3-*5 (6th Cir. Dec. 21, 2005) (unpublished).

b. The facts in *McCoy* also differ substantially from the circumstances of petitioner's alleged offense. *McCoy* involved a single photograph of the defendant and her daughter, partially unclothed, posed side-by-side with their genital areas exposed. 323 F.3d at 1115, 1122, 1132. The court of appeals stressed that the visual depiction on which the prosecution was based was a "family photo (pornographic as it may have been)," *id.* at 1122, and the court attributed the incident to the defendant's consumption of large quantities of alcohol, *id.* at 1115. The court of appeals expressly limited its constitutional holding to "McCoy's circumstances and those of others similarly situated." *Id.* at 1131. In subsequent decisions, the Ninth Circuit has declined to extend its holding in *McCoy* and has rejected other defendants' Commerce Clause attacks on the federal child-pornography laws. See *United States* v. *Adams*, 343 F.3d 1024, 1027 (9th Cir. 2003), cert. denied, 542 U.S. 921 (2004);

United States v. *Tashbook*, 144 F. App'x 610 (9th Cir. 2005), cert. denied, 126 S. Ct. 777 (2005). As with *Corp*, the facts of *McCoy* are far removed from the predatory behavior alleged in this case.

c. The offense of conviction in *Corp* and *McCoy* was possession of child pornography, in violation of 18 U.S.C. 2252(a)(4)(B). Petitioner, by contrast, was indicted for inducing a minor to engage in sexually explicit conduct for the purpose of producing child pornography, in violation of 18 U.S.C. 2251(a). Although both provisions are part of a comprehensive congressional effort to attack the "extensive national market in child pornography," *Holston*, 343 F.3d at 89, the "produced using materials" jurisdictional element has a more direct and immediate link to the offense conduct in cases where the defendant himself has used materials that moved in interstate commerce to produce the child pornography.

d. Both *Corp* and *McCoy* predate this Court's decision in *Raich*, on which the court of appeals in this case heavily relied, and *Raich* calls into serious doubt the continuing validity of those decisions. If future cases in which *Corp* and *McCoy* would otherwise be controlling arise within the Sixth and Ninth Circuits, those courts of appeals may reconsider their precedents in light of the intervening decision in *Raich*. See *Tashbook*, 144 F. App'x at 613 & n.2 (noting the potential tension between *McCoy* and *Raich*, but declining to determine *McCoy*'s continuing precedential force because the case before the court was distinguishable on its facts); *Gann*, 2005 WL 3528917, at *5-*6 (distinguishing *Corp* on its facts while rejecting, as inconsistent with *Raich*, the contention that application of Section 2251(a) is unconstitutional absent proof of an intent to sell, trade, or distribute the child pornography produced by the defendant).

The substantial uncertainty about whether *Corp* and *McCoy* remain good law within the circuits that issued those decisions provides an additional reason for this Court to deny review here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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VIRGILIO JERONIMO-BAUTISTA, Petitioner, vs. UNITED STATES OF AMERICA, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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Question Presented by Prosecution

Whether petition for certiorari may be granted where a trial court dismissed an indictment for lack of jurisdiction rather then acquitted Petitioner after a full trial on the merits.

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ARGUMENT

The government's stance that Mr. Jeronimo-Bautista's Petition for Certiorari is merely an interlocutory appeal is misplaced and a perversion of Petitioner's constitutional right to due process. This Court clearly defined a final order or decision as "[a] decision that ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment." See Green Treen Fin. Corp. -Alabama v. Randolph, 531 U.S. 79, 86; 121 S.Ct. 513; 148 L. Ed. 2d 373 (2000)(quoting Digital Equipment Corp. v. Desktop Direct Inc., 511 U.S. 863, 867; 128 L. Ed. 2d 842; 114 S. Ct. 1992 (1994).

The government further argues that the petition for certiorari should be denied because, "[i]f petitioner is acquitted following a trial on the merits, his constitutional claim will become moot. If he is convicted, he will be entitled to reassert his current challenge of 18 U.S.C. 2251(a), in addition to any other claims he may have at that time." See United States Brief in Opp. 5-6. The government's theory for denying the petition for certiorari is nonsensical in that

it requires this Court to assume that the district court's dismissal of the indictment for lack of federal jurisdiction was not a final judgment, and further, that the Petitioner lacks any constitutional rights to due process until after he has been through the burden of a full trial in the district court.

Petitioner has asked this Court to consider the constitutionality of being tried for the charges set forth in his indictment. The Government's argument is that Petitioner should be unconstitutionally tried in the lower court before this Court determines the constitutionality of such a trial. Such reasoning is inane and would lead to a gross violation of Petitioner's constitutional rights. It would require a court lacking subject matter jurisdiction to go forward, on the theory that the jurisdictional violation could be cured later on appeal.

The Government's argument regarding the "interlocutory posture of the case" (United States Brief in Opp. 5) is further mistaken in that Petitioner's petition for certiorari is the only chance Petitioner has to appeal United States v. Jeronimo-Bautista, 425 F.

3d 1266 (10th Cir. 2005). If this petition for certiorari is denied and Petitioner loses in district court and loses an appeal to the Tenth Circuit, then Petitioner has the opportunity to petition for certiorari on the *second* appeal, not the Government's appeal of the dismissal of the indictment.

The Government's position that a petition for certiorari should be denied because the Tenth Circuit "merely" reversed the district court, and that this appeal is really only interlocutory, should not be considered in this Court's determination to grant certiorari.

CONCLUSION

This Court should grant certiorari to resolve issues pending here regarding the Commerce Clause.

RESPECTFULLY SUBMITTED this 6 day of April, 2006.

CORPORON, WILLIAMS & BRADFORD P.C.

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Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused one true and correct copy of the foregoing to be mailed to:

PAUL D. CLEMENT
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on the 6 day of April, 2006.

MARY C. CORPORON